

1987

# Dukane Corporation v. Bonnie Birch : Reply Brief

Utah Supreme Court

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Irshad A. Aadil; Attorney for Appellant.

Stephen B. Mitchell; Attorneys for Respondent.

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UTAH COURT  
BRIEF

UTAH  
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DOCKET NO.

870015

IN THE SUPREME COURT OF THE STATE OF UTAH

DUKANE CORPORATION,

Plaintiff/Respondent.

VS.

BONNIE BIRCH,

Defendant/Appellant.

CASE NO:

870015

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, DENYING THE DEFENDANT'S  
MOTIONS TO SET ASIDE THE DEFAULT JUDGMENT.  
HONORABLE TIMOTHY R. HANSON, JUDGE.

STEPHEN B. MITCHELL  
139 E. South Temple, Suite 2001  
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Telephone: 355-6677

ATTORNEY FOR RESPONDENT

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ATTORNEY FOR APPELLANT

**FILED**

JUL 20 1987

Clerk, Supreme Court, Utah

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RESPONSE TO DUKANE'S OBJECTION

Cranney responds to the objection by Dukane on Cranney's Statement of facts as follows:

It is necessary to give some background information on the series of motions filed by Cranney to understand the nature of proceedings, their sequence and the reasons for such unusual sequence.

Cranney simply mindedly believed that the Judgment can be settled simply because her divorce decree states that it is not her responsibility, as she was misled to believe by her ex-husband and his attorney (Her affidavit R:62-72) As soon as she contacted the undersigned a motion to set aside was filed based on the provisions of Rules 55(c) and 60(b), which was denied on October 20, 1986. After the ruling the undersigned told Cranney that her next step is an appeal. However, Cranney at her own initiative called the Court and the Court advised her to come before it with the file and a motion. It is clear that the Court did not consider the matter as final yet. As Cranney appeared pro se with her motion on November 10, 1986 she showed the Court letters of handwriting expert (R:99) and Donna Hagio (R:113-114) which were not notarized. The Court abruptly denied her motion advising that they should have been notarized. Cranney encouraged by the Court's advice got notarized statements dated: November 17, 1986 and November 25, 1986, respectively as the record shows

and filed another motion which was denied on December 8, 1986.

It should be noted very carefully that Cranney did what the Court advised her to do simply because the Court did not believe that it has made a final determination. In fact the Court advised in writing and specifically required that Rule 54(b) motion be made to make any judgment final, pursuant to its letter dated December 30, 1985, as attached herewith and made part hereof as Exhibit: "C".

It should be noted further that the undersigned prepared the findings of fact on or about April 6, 1987 and that the Court in the presence of the undersigned telephonically inquired from the Counsel of Dukane if the Judgment be made final.

The Court has not even made its order final until 7th April, 1987, therefore, the question of untimeliness does not even arise.

#### OBJECTION TO DUKANE'S STATEMENT OF FACTS

Cranney objects to the following representations contained in Dukane's Statement of Facts for the reasons stated in each objection:

1. It is not clear on page 4 of the Dukane's Statement of Facts that Cranney did sign the first Guaranty papers but she denied signing the second one which is the basis of the action. It was prudent on her part to call Dukane to inform them so that she is not billed even under her first surety in future. Since she was going through divorce proceedings and

did not want to lose her claims in the divorce matter so she did assert her claim as "fifty-fifty partner" but she did not admit at all that she equally signed the second surety. Therefore, the words should not be taken out of the context specially considering the fact that the second guaranty paper was signed on the 29th of March 1984, the day parties separated and Cranney's ex-husband went to file for a divorce. R:26-27 and Exhibit A.

2. Cranney did not know that she could file any objections against the proposed judgment, so it is an unfair assumption that she accepted the judgment while she kept calling Dukane and its counsel not knowing the time fram to file a motion to set aside. She thought it could be done informally since she is a person of very peaceful nature. It does not matter whether a month goes by or a year if a person does not know the process and its time limitations specially considering the fact that a judgment even though mailed to a defendant does not inform her of an animal like a motion to set aside and its time frame. So, the legal process itself is incomplete and ambiguous.

3. There is no support in the record concerning the facts in the first paragraph on page 6 of Dukane's Statement of Facts. Those are mere allegations totally denied by Cranney and her mother in the Carbon County action; and they bear no relevance to the issues discussed herein. To show the oppressive

and abusive nature of Dukane's law suit against cranney and her widow mother, a correct copy of the Warranty Deed signed by all children ( BUT JUST CRANNEY) in favor of their mother dated: February 1st 1984, is attached herewith as Exhibit:D. It is another nuisance suit by Dukane and which Dukane has mentioned in its brief simply to depict a false picture of Cranney.

4. Last paragraph of Dukane's Statement of Facts on page 5, is simply an unfair conclusion that Cranney never contended that the Judgment was improper. As stated earlier and as supported by her affidavit, Cranney simple mindedly believed that if the Court in her divorce matter has stated [R:09] that Dukane is not her responsibility, her conveying the same message to Dukane and its attorney was sufficient to " settle" or "lift " the default Judgment. Please also see Exhibits: B and E. Had she known the legal proceedings and the jargon she could be expected to act like an attorney. She logically thought that attorneys would respect the decision of the divorce court to resolve another matter in a similar court.

#### ARGUMENT

##### I. THE APPEAL IS TIMELY FOR THE REASONS AS FOLLOWS:

A.The Court required Rule 54(b) motion to make any Judgment final and such determination was not made until April 7, 1987.

B. Cranney filed her motion (second motion) pro se as advised by the Court in a telephonic advice to Cranney a week after the denial of her motion through this counsel.

C. Cranney filed her second motion pro se as the Court advised that certain statements should have been notarized.

D. The Court could hear as many motions as it deems proper until it advises otherwise. In this case the Court did not decide otherwise until April 7, 1987 as it signed the final order and Findings of Fact. etc.

II. THE ORDER STRIKING CRANNEY'S PLEADINGS  
AND SIMULTANEOUSLY GRANTING A DEFAULT IS IMPROPER FOR THE REASONS  
AS FOLLOWS :

A. "SCHEDULING ORDER AND TRIAL NOTICE"  
which in the first place Cranney denies receiving does not have:  
(1) proper caption in terms of including a default penalty,  
(2) proper contents in terms of warning about a default and  
(3) proper waiver clause in terms of authority to enter a  
default without further rights to a hearing.

Therefore, Dukane was required to notice a motion seeking a default judgment after the pleadings were stricken because absence of authority in a notice would certainly have conflict with due process requirements when it comes to depriving people of certain substantial rights such as a fair hearing.



CONCLUSION

For the foregoing reasons and reasons submitted in the brief of appellant, Cranney, it is respectfully prayed that the default judgment entered against Cranney be set aside so that the lower Court could decide the complicated questions to arrive at a decision based on the merits of the matter instead of the technicalities used to enter the default.

DATED: This 18th day of July 1987.

Respectfully submitted,

BY: 

IRSHAD A. AADIL

Attorney for defendant/appellant.

CERTIFICATE OF MAILING

I, the undersigned hereby certify mailing 4 true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to: Stephen B. Mitchell Esq., Attorney for respondent at: 139 East South Temple, Salt Lake City Utah, 84111 this 20TH day of July 1987.

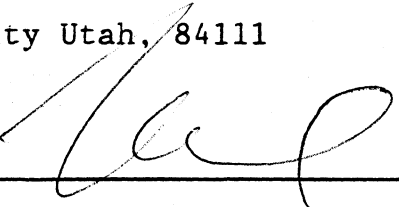
- 

EXHIBIT: C

Timothy R. Hanson  
Judge

Courts Building  
240 East Fourth South  
Salt Lake City, Utah 84111  
(801) 535-5677



December 30, 1985

Stephen B. Mitchell, Esq.  
Burbidge & Mitchell  
139 E. South Temple, Suite 1  
Salt Lake City, Utah 84111

FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

DEC 30 1985

Re: Dukane Corporation v. Cranney Productions  
Civil No. C-85-2996

H. D. Can. Hindley, Clerk 3rd Dist. Court  
*Timothy R. Hanson*  
Deputy Clerk

Dear Mr. Mitchell:

Please be advised the Court has received your proposed Order granting Partial Summary Judgment as to defendant Cranney Productions Ltd. Hearing no objections to the Order, the Court has executed the same, but has deleted from the proposed Order the language setting forth the finality of the Judgment, which I assume is being made pursuant to Rule 54(b). I have merely lined through the last full sentence in the proposed Order granting Partial Summary Judgment.

It is the Court's opinion that the question of whether or not this is a final Judgment needs to be made either in the original Motion so the parties will have an opportunity to address that issue if they think that is appropriate, or that such a request that the Judgment be made final pursuant to Rule 54(b) be done by way of motion. Under the present Supreme Court guidelines involving finality of Judgments pursuant to Rule 54(b), certain findings have to be made which have not been addressed in the motion, nor outlined in the proposed Order.

I trust that if you desire to have this Judgment against Cranney Productions Ltd. final for purposes of appeal under Rule 54(b), that you will make the appropriate motion.

The Court has also received your Certificate of Readiness for Trial, and pursuant to that request please find enclosed a copy of an Order for Scheduling Conference.

Very truly yours,

Timothy R. Hanson  
District Court Judge

TRH:jsh  
Enclosure

Entry No. 003348  
Indexed ✓  
Abstracted ✓  
Reg. Fee 11.00

Hilma P. Birch  
APR 4 2 24 PM '84

BOOK 237 OF Records  
PAGE 820-822  
ANN O'BRIEN  
COUNTY REC'D

EXHIBIT

D

WARRANTY DEED

THIS WARRANTY DEED is made this 1st day of February, 1984, by HILMA POLLOCK BIRCH of Helper, Utah, KEITH P. BIRCH of Salt Lake City, Utah, CONNIE BLISS BIRCH BOGENSCHUTZ of Salt Lake City, Utah, BONNIE ALICE BIRCH CRANNEY of Salt Lake City, Utah and GINA CHERIE BIRCH COOK of Salt Lake City, Utah, (hereinafter the "Grantors"), to HILMA POLLOCK BIRCH, KEITH P. BIRCH, CONNIE BLISS BIRCH BOGENSCHUTZ and BONNIE ALICE BIRCH CRANNEY (hereinafter the "Grantees").

For the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Grantors hereby convey and warrant to HILMA POLLOCK BIRCH, Route 1, Box 144, Helper, Utah 84526, an undivided one-fourth (1/4) interest as a tenant in common; hereby convey and warrant to KEITH P. BIRCH, 556 Delno Drive, Salt Lake City, Utah 84107, an undivided one-fourth (1/4) interest as a tenant in common; hereby convey and warrant to CONNIE BLISS BIRCH BOGENSCHUTZ, 3626 Capstone Way, Salt Lake City, Utah 84121, an undivided one-fourth (1/4) interest as a tenant in common; and hereby convey and warrant to GINA CHERIE BIRCH COOK OF SALT LAKE CITY, UTAH an undivided one-fourth (1/4) interest as a tenant in common in the real property situated in Carbon County, State of Utah, more particularly described as follows:

- 2-800 ✓ The Northeast Quarter of the Northeast Quarter of Section 7, Township 14 South, Range 10 East, Carbon County, Utah.
- 2-800 ✓ The West Half of the Southwest Quarter of Section 5, Township 14 South, Range 10 East, Carbon County, Utah.
- 2-800 ✓ The Northwest Quarter of the Northwest Quarter of Section 8, Township 14 South, Range 10 East, Carbon County, Utah.

IN WITNESS WHEREOF, Grantors have executed this Deed the day and year first above written.

GRANTORS:

Hilma Pollock Birch  
Hilma Pollock Birch

Keith P. Birch  
Keith P. Birch

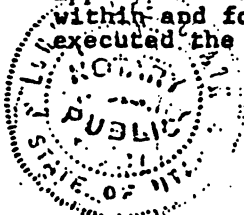
Connie Bliss Birch Bogenschutz  
Connie Bliss Birch Bogenschutz

Bonnie Alice Birch Cranney  
Bonnie Alice Birch Cranney

Gina Cherie Birch Cook  
Gina Cherie Birch Cook

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On the 1st day of February, 1984, personally appeared before me BONNIE ALICE BIRCH CRANNEY, a signer of the within and foregoing Deed, who duly acknowledged to me that she executed the same.



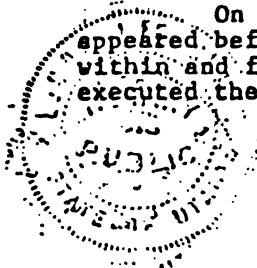
*Linda L. Clark*  
NOTARY PUBLIC  
Residing at: 1462 N. 6400 W. Butte

My Commission Expires:

January 1985

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

On the 1st day of February, 1984, personally appeared before me GINA CHERIE BIRCH COOK, a signer of the within and foregoing Deed, who duly acknowledged to me that she executed the same.



*Linda L. Clark*  
NOTARY PUBLIC  
Residing at: 1462 N. 6400 W. Butte

My Commission Expires:

January 1985

65348

July 10, 1986

EXHIBIT: E

Bonnie Birch Cranney  
1298 Chandler Dr.  
Salt Lake City, Utah 84103

Dukane Corp.  
St. Charles, Ill.

Dear Dukane and Ed Wiert,

I am sending you a copy of the divorce decree. According to the second clause of the divorce decree it reads:

Liens and claims against the house that are related to the business shall be assumed and paid by the plaintiff, including the Dukane obligation.

I am sending Burbidge and Mitchell a copy of this letter and I would like this judgement lifted off from the home on Chandler Dr. and Bonnie Birch Cranney lifted.

Sincerely,

*Ms Bonnie Birch Cranney*  
Ms. Bonnie Birch Cranney

cc? Burbidge & Mitchell